

Vickers 149767



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Chief Warrant Officer Roberto Whittinham  
**File:** B-251866  
**Date:** July 30, 1993

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### DIGEST

1. Member may be reimbursed monies withheld from rent paid in advance for painting and repairs on leased residence under lease clause which stated that if tenant vacated within first 2 years of lease, residence had to be repainted because member had to vacate due to closing of military facility.

2. Where member departed leased residence prior to lease term because of member's request to join Warrant Officer Training program, rent paid in advance with advance housing allowance which was withheld by landlord became a debt of member which may not be waived because waiver is only proper when an erroneous payment is made and the advance of housing allowance was proper when made.

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### DECISION

Chief Warrant Officer (CW3) Roberto Whittinham has appealed our Claims Group September 30, 1992, settlement denying his claim for reimbursement of the expenses he incurred in terminating a lease incident to a transfer from the Defense Attache Office, San Jose, Costa Rica and in connection with a lease in Mexico City, Mexico.

As a member of the Department of the Army, CW3 Whittinham was stationed at the Defense Attache Office (DAO), San Jose, Costa Rica and on July 15, 1989, signed a 2-year lease payable yearly in advance. In December 1990, a decision was made to close the DAO in San Jose by mid-January 1991.

Clause 12 of the lease agreement provided that in the event of the tenant's transfer the lessor would not be entitled to any damages and would be entitled to rent only up to the date of the tenant's departure, but that the provisions of clause 9 of the lease would apply. Clause 9 of the lease agreement provided that "if the lessee leaves the premises, for any cause, before the first 2 years of the contract, he must return the premises painted and with the necessary repairs done." Since CW3 Whittinham left the premises after

only 18 months, and apparently did not make arrangements to comply with the lease, the landlord withheld \$3,000 for the painting and repairs from what he refunded to CW3 Whittinham.

CW3 Whittinham contends that he was on a 3-year assignment to the DAO and if he had been permitted to remain in the leased quarters until the first 2 years passed, clause 9 would not have become operative. Therefore, he alleges that because of the government's action in closing the DAO, he suffered a \$3,000 loss over which he had no control.

In a recent decision involving a similar situation, Captain Michael Stek, Jr. USN (Retired), B-248554, Nov. 24, 1992, we found that the member, who had signed a long term lease in accordance with local custom and paid a year's rent in advance, upon being transferred prior to the expiration of the lease could be reimbursed the amount lost because of the government's actions. In that case, as here, the member had been advanced Overseas Housing Allowance in order to make the advance payment of the rent. Likewise, both members would have completed their tours of duty and fulfilled the terms of the leases except for the government's action.

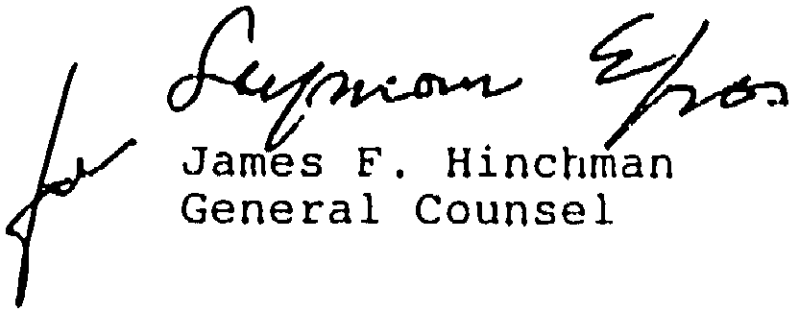
Accordingly, we find that CW3 Whittinham may be reimbursed the \$3,000 which was forfeited because of the early termination of the lease.

Regarding the lease in Mexico City, when he was stationed there in 1985, CW3 Whittinham was advanced overseas housing allowance and his lease required that he provide 30 days notice of intention to vacate the quarters to avoid the forfeiture of advanced rent.

In February 1985, CW3 Whittinham requested separation from the Air Force in order to attend the U.S. Army Warrant Officer Candidate training program. His request for separation was granted on February 7, 1985, and he enlisted in the Army on February 8, 1985. He notified the landlord on February 8 of his intent to vacate and departed on February 17. Because of the early departure, the landlord only returned \$7,800, which CW3 Whittinham reimbursed to the Air Force. However, the Air Force found that CW3 Whittinham owed the entire unearned portion of the advance of \$10,693.70 plus interest and offset the balance (\$2,893.70) from his Army salary. CW3 Whittinham contends that he is only responsible for repaying the amount of the advance that was returned by the landlord. Our Claims Group indicated, however, that CW3 Whittinham should attempt to secure a refund of the interest on the debt by providing additional information to the Air Force to demonstrate that interest is not owed.

Waiver is only appropriate under 10 U.S.C. § 2774 when there is an erroneous payment. Here, there was nothing erroneous about the amount of the overseas housing allowance based on his orders. The only reason there was a debt owed by CW3 Whittinham was the fact that he asked to separate from the Air Force to pursue the Warrant Officer Training program with the Army. Without this request on his part, the lease would have been fulfilled and no debt would have arisen. Therefore, the debts arising from the advance of the allowances may not be considered for waiver under 10 U.S.C. § 2774.

Accordingly, the action of the Claims Group is sustained in part and reversed in part.

  
James F. Hinchman  
General Counsel